Supreme Court, U. S.
FILED
SEP 12 1975
MICHAEL RODAK, JR., CLERK

No. 75-149

In the Supreme Court of the United States

OCTOBER TERM, 1975

FIRST BANK AND TRUST COMPANY OF BOCA RATON,
As Trustee Under Trust Agreement Dated March 23, 1964,
And Known As Trust No. T509,

Petitioner,

vs.

TOWN OF PALM BEACH,
a Florida Municipal Corporation, et al.,

Respondents.

PETITIONER'S REPLY BRIEF

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The thrust of respondents' Brief in Opposition is that petitioner's Petition for a Writ of Certiorari should be denied on procedural grounds. Petitioner's attempt to raise the federal question in the proceedings below is characterized as "[b]elated and [i]neffectual." (Resp. Br. p. 8) * As respondents have devoted almost no atten-

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* "Resp. Br." refers to respondents' Brief in Opposition. "Pet. App." refers to petitioner's Appendix to its Petition for a Writ of Certiorari.

tion to the important substantive issues of the case, this Reply Brief will be limited to refuting respondents' procedural arguments.

I.

Respondents' repeated assertion that the Florida District Court of Appeal did not permit the filing of petitioner's supplement to its original petition for rehearing, wherein the constitutional issues were first raised, is not reflected in any order that was entered by the District Court of Appeal. There was, in fact, no order entered in connection with the petition for rehearing denying leave to file the supplement to the petition and it must be presumed that the District Court considered the supplement along with the original petition, which was timely filed.

II.

However, even assuming *arguendo* that the supplement was not timely filed, it does not follow, as respondents argue, that petitioner thereby waived its right to an adjudication of the federal question.

Respondents seek to apply the holding of *Brinkerhoff-Faris Co.* v. *Hill,* 281 U.S. 673 (1930), to the instant case. (Resp. Br. pp. 12-13) The Court in *Hill* held that the raising of a federal question for the first time on a petition for rehearing to the Missouri Supreme Court was timely, since it was made at the first opportunity, owing to the fact that it was the very decision of the Missouri court which gave rise to a violation of the Due Process Clause. In *Hill* there was no way, short of a petition for rehearing, for the aggrieved party to pursue a remedy for this violation in the state court system. What respondents overlook in their arguments concerning the petition for

rehearing in the District Court of Appeal is that the petition was neither an exclusive nor a necessary remedy under Florida law. In addition to it petitioner had, and utilized, the opportunity to seek review of the District Court decision in the Florida Supreme Court. Neither the Florida Constitution nor the Florida Appellate Rules make the filing of a petition for rehearing in the District Court a prerequisite for seeking review in the Supreme Court.

In fact, in the Florida courts, respondents took the position that the petition for rehearing was not a proper vehicle to raise the constitutional issue, since that issue involved "new grounds not previously presented." (Resp. Br. p. 8) Ironically, respondents now urge this Court dismiss the petition for certiorari because these "new grounds" were not first presented in a timely petition for rehearing!

III.

Respondents' claim that petitioner did not raise the federal constitutional issue in the Florida Supreme Court is a misstatement of the record. Petitioner's theory in the Florida Supreme Court was that the District Court's decision was in direct conflict with the Supreme Court's order promulgating Florida Appellate Rule 5.12. The Supreme Court is presumed to have promulgated a constitutionally valid rule. Petitioner specifically argued that "the decision of the District Court, by construing Rule 5.12 to permit petitioner's right to be defeated without benefit of a hearing or a final judicial determination, places an unconstitutional interpretation on that Rule." (Pet. App. p. 49a) Petitioner's Brief in Support of Certiorari discussed in detail the grounds of unconstitutionality. (Pet. App. pp. 42a-52a) The phrasing of the issue in terms of conflict, thereby invoking the certiorari jurisdiction of the Supreme

Court under Article V, §3(b)(3) of the Florida Constitution, was the only means to present the constitutional issue to that court. The appeal remedy under Article V, §3(b)(1), suggested by respondents (Resp. Br. p. 15), was not available, since the District Court of Appeal did not "directly" pass on the validity of Rule 5.12 as required by §3(b)(1).

IV.

Respondents further assert that it is not clear from the pleadings below "whether petitioner was asserting violation of its due process and equal protection rights under the federal *or the state* constitution." Respondents' assertion is plainly incorrect, as petitioner invoked both the state *and* the federal constitutions in paragraph 6 of its Additional Suggestion to Certify Decision to the Supreme Court, submitted along with its Supplement to Petition for Rehearing filed in the Florida District Court of Appeal (Pet. App. p. 48a):

> "6. If Rule 5.12, F.A.R. operates to permit a municipality to defeat the rights of a successful litigant by taking actions contrary to the Final Decree during the pendency of an appeal, is Rule 5.12 F.A.R. unconstitutional under United States and Florida Constitutions as denying such litigant due process and equal protection?"

This paragraph meets the requirements of *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63 (1928), upon which the respondents rely. There, the Court stated at p. 67:

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

CONCLUSION

For the reasons stated herein, in addition to the reasons set forth in its Petition for a Writ of Certiorari, petitioner prays that said Petition be granted.

Respectfully submitted,

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